IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHEPLER CONSTRUCTION, INC. Respondent, v. GARY LEONARD and SUSAN KIRALY-LEONARD, and the marital community thereof, Appellants, PHH MORTGAGE SERVICES CORPORATION, a New Jersey corporation, Defendant.	)	No. 61900-4-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2009

Appelwick, J. — Where neither party timely invokes a construction contract's arbitration provision and where both parties pursue litigation to address their contract dispute claims for six years, we hold that the arbitration provision was waived by each party. The trial court did not err in denying the motion to compel arbitration. We affirm.

FACTS

Gary Leonard and Susan Kiraly-Leonard contracted with Shepler Construction, Inc., to build a custom home. Leonard v. Shepler Construction, Inc., noted at 132 Wn. App. 1054, 2006 WL 1217216, at * 1, review denied, 160 Wn.2d 1014, 161 P.3d 1027 (2007). The fixed price contract contained a dispute resolution mechanism and a provision for Shepler to remedy nonconforming work before final payment. Id. After construction began, disputes between the Leonards and Shepler's employees led to difficulties between the parties. Id. Progress payments eventually stopped, work ceased, and the Leonards notified Shepler, through their lawyer, that its employees were not allowed on the site. Id.

In December 2001, Shepler sent a letter regarding the dispute, requesting a progress payment in the amount of $35,927. The letter stated that "[s]hould any part of the completed work remain unsatisfactory, we should both refer to the Dispute Resolution portion of the Building Agreement and initiate that process." Another letter sent March 14, 2002, stated:

> The contract makes it clear that the Leonard's had the responsibility to bring such issues to the contractor's attention in a timely manner. It does not appear that they did so. In any event these issues are to be addressed under the dispute resolution provisions of the underlying contract. Your letter reads as if your client is refusing to abide by this aspect of the contract. Please confirm whether or not that is the case.

The Leonards did not respond to the demands for dispute resolution of their claims. Instead, they sent a letter about the incomplete work.

Shepler filed a mechanic's lien against the Leonards' property. Id.

Shepler subsequently filed suit to enforce the lien and obtain damages for breach of contract. Id. The Leonards filed counterclaims, including a construction defect claim alleging that Shepler breached the contract by failing to complete the work in a workmanlike manner. The Leonards also alleged that Shepler billed for work not performed, failed to obtain approval for additional work, and abandoned the worksite at crucial times during the project. The Leonards claimed that these actions resulted in substantial damages, including required repairs of Shepler's deficient work. Meanwhile, the Leonards hired another contractor, Sliger Construction, to finish construction of the home. Id.

Shepler moved for summary judgment on the lien and the Leonards' construction defect counterclaim. Id. The court granted Shepler's motion for summary judgment on the counterclaim only. Id. Subsequently, the court held a trial on the enforcement of the mechanic's lien. Id. The court entered judgment in favor of Shepler and awarded Shepler attorney fees under the contract. Id. at 2.

The Leonards appealed the dismissal of their counterclaims on summary judgment. Id. This court reversed the grant of summary judgment and remanded, holding that genuine issues of material fact existed on the counterclaims. Id. at 3.

In 2008, Shepler again filed for summary judgment on the counterclaims, arguing that the Leonards had breached the contract by failing to seek arbitration of the counterclaims. The trial court denied the motion. Shepler filed

a motion for reconsideration. The trial court granted summary judgment on March 31, 2008. The Leonards did not directly appeal the grant of summary judgment.

On April 11, 2008, the Leonards filed a motion for reconsideration of the summary judgment order or to compel arbitration and for a limited stay. The court denied the motion, finding it was "not timely under the rules and should not have been filed." The court awarded attorney fees in the amount of $500 to Shepler. But, the court determined that "defendant's right to bring a timely motion to compel arbitration at a later date is preserved." Again, the Leonards did not appeal this order.

On May 21, 2008 the Leonards filed a motion to compel arbitration and a motion for a stay pending the completion of arbitration. The court denied the motion. On June 20, 2008, the Leonards appealed the order denying their motion to compel arbitration and stay the proceedings and all related rulings.

DISCUSSION

I. Mootness

As a preliminary issue, Shepler claims that the appeal is moot, because it is now offering to arbitrate, therefore, no controversy exists and this court need not consider the claimed error. A case is moot if a court can no longer provide effective relief. Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). The issue of mootness is directed at the jurisdiction of the court. Citizens for Financially Responsible Gov't v. City of Spokane, 99 Wn.2d 339,

350, 662 P.2d 845 (1983). We decline to hold that the case is moot.

II. Motion to Compel Arbitration

We review whether the trial judge properly denied the motion to compel arbitration de novo. Scott v. Cingular Wireless, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). Shepler, as the party opposing arbitration, bears the burden of showing the arbitration clause is inapplicable or unenforceable. Id.

The Leonards sought an order to compel arbitration nearly six years after the start of this litigation. Shepler argues that the Leonards waived arbitration and are therefore estopped from invoking it.

In fact, Washington courts have long held that the contractual right to arbitration may be waived through a party's conduct if the right is not timely invoked. See, e.g., Ives v. Ramsden, 142 Wn. App. 369, 382–83, 174 P.3d 1231 (2008) (securities broker impliedly waived arbitration by not raising it in his answer to plaintiff's complaint); Harting v. Barton, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (failure to pursue mediation waived the issue); B & D Leasing Co. v. Ager, 50 Wn. App. 299, 303, 748 P.2d 652 (1988) ("parties to an arbitration contract may expressly or impliedly waive that provision . . . by failing to invoke the provision when an action is commenced."). The right to arbitrate is waived by conduct inconsistent with any other intent and "a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time." Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 62, 64, 621 P.2d 791 (1980); see also Shoreline Sch. Dist. No.

412 v. Shoreline Ass'n of Educ. Office Employees, 29 Wn. App. 956, 958, 631 P.2d 996, 639 P.2d 765 (1981). Most recently, in Otis Housing Ass'n v. Ha, the Washington Supreme Court explained that "[s]imply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate." 165 Wn.2d 582, 588, 201 P.3d 309 (2009).

The facts before this court establish that both parties waived arbitration. Neither party initiated a notice of arbitration as provided by chapter 7.04A RCW. Neither party asserted a right to arbitration in their answers to the pleadings of the other party. Moreover, both parties conducted discovery and engaged in substantial litigation including a prior appeal of the counterclaims. Seven years passed, and substantial case development occurred prior to the Leonards' assertion of the right to arbitrate. We hold that the trial court did not err in denying the motion to compel arbitration.

III. Summary Judgment

The Leonards contend that the trial court erred when it granted summary judgment, finding their counterclaims were waived for failing to comply with the arbitration clause of the contract.[1]

As a threshold matter, we must decide if the arguments regarding the summary judgment order are properly before this court. RAP 2.2(a)(1) allows a party to appeal a final judgment of any proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

[1] The arbitration clause did not provide that it was the exclusive remedy for breach. As noted above, the parties waived the arbitration clause by litigating, not the underlying claims. The Leondards did not directly appeal the March summary judgment order, but argue that we should consider it pursuant to RAP 2.4(b). Shepler has not objected.

This notice must be filed within 30 days after the entry of the decision of the trial court. RAP 5.2(a). Here, the Leonards failed to appeal the trial court's grant of summary judgment within the thirty days as required by RAP 5.2. But, they request review of summary judgment pursuant to RAP 2.4(b), which states:

> The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

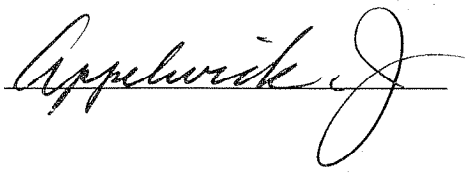
We decline to read RAP 2.4(b) so expansively. The summary judgment order was filed on March 31, 2008. This was a final determination of their counterclaims, and failure to timely appeal that order extinguished those claims. By the time the Leonards filed their motion to compel arbitration, on May 21, 2008, there were no counterclaims to be arbitrated. See Carrara, LLC v. Ron & E Enters., 137 Wn. App. 822, 155 P.3d 161 (2007). Appeal of the June order denying the motion to compel arbitration does not place the March summary judgment order before us.

IV. Trial Verdict and Attorney Fees

Last, Shepler argues that the court should reinstate the trial verdict pursuant to RAP 12.2, which states that "[t]he appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." We agree. The unappealed summary judgment order disposed of any potential counterclaims. No purpose would be served by relitigating the Leonards' claims.

The contract contained an attorney fees provision, allowing fees and costs to the prevailing party "in respect to enforcement of any term of this agreement." RCW 4.84.330 provides for an award of attorney fees and costs to the "prevailing party" in any action on a contract. Because we affirm the trial court, Shepler is the prevailing party in this action and is awarded fees on appeal.

We affirm.



WE CONCUR: